

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE: DA VINCI SURGICAL ROBOT) Lead Case No.:
ANTITRUST LITIGATION) 3:21-cv-03825-VC

THIS DOCUMENT RELATES TO:
ALL ACTIONS

SURGICAL INSTRUMENT SERVICE) Case No.
COMPANY, INC.,) 3:21-CV-03496-VC

Plaintiff,

vs.

INTUITIVE SURGICAL, INC.,

Defendant.

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY
UNDER THE PROTECTIVE ORDER
VIRTUAL VIDEOCONFERENCE VIDEO-RECORDED
DEPOSITION OF DAN JONES

Thursday, November 10, 2022
Remotely Testifying from Alexandria, Virginia

Stenographically Reported By:

Hanna Kim, CLR, CSR No. 13083

Job No. 5564633

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 2 NORTHERN DISTRICT OF CALIFORNIA
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 9 COMPANY, INC.,) 3:21-CV-03496-VC
)
)

10 Plaintiff,)
)

11 vs.)
)

12 INTUITIVE SURGICAL, INC.,)
)

13 Defendant.)
 14)

15 HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY
 16 UNDER THE PROTECTIVE ORDER, virtual videoconference
 17 video-recorded deposition of DAN JONES remotely
 18 testifying from Alexandria, Virginia, on Thursday,
 19 November 10 beginning at 12:06 p.m., EST, and
 20 concluding at 2:36 p.m., pursuant to the
 21 stipulations of counsel thereof, before Hanna Kim,
 22 CLR, Certified Shorthand Reporter, No. 13083.
 23
 24
 25

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21 Also Present:

22 MICHAEL BARANKOVICH, Videographer

1 you didn't know about the sterilization processes
2 that third parties such as Rebotix performed with
3 respect to EndoWrist instruments?

4 MS. CAHOY: Objection to form.

5 THE WITNESS: That's correct. We didn't
6 know specifically what sterilization processes they
7 were using.

8 BY MR. VAN HOVEN:

9 Q. It -- and I -- I may have this wrong, but
10 did you say that you became aware of these sort of
11 third party instrument companies around 2015 or
12 2016?

13 MS. CAHOY: Objection to form.

14 THE WITNESS: I don't recall the specific
15 date, but sometime, I think it was 2015, we saw a
16 patent publication from a company that was trying to
17 patent a hack to da Vinci instruments.

18 BY MR. VAN HOVEN:

19 Q. And -- and once Intuitive became aware of
20 the potential for third parties to perform those
21 operations, did it do any monitoring of instruments
22 to look for that?

23 MS. CAHOY: Objection to form.

24 THE WITNESS: I don't know if we did.
25 What -- there would be different forms of monitoring

1 through looking at system logs specifically for
2 that, or whether it was hospitals. We had heard
3 rumors through hospitals earlier than 2015 that
4 someone might try to do this.

5 BY MR. VAN HOVEN:

6 Q. And did -- at some point, did this
7 activity seem to increase?

8 MS. CAHOY: Objection to form.

9 THE WITNESS: At some point with the
10 introduction into Europe, but it seemed to be the
11 first instances where we knew hospitals were being
12 approached.

13 BY MR. VAN HOVEN:

14 Q. About when was that?

15 A. I want -- I want to say it was in the
16 2016, '17 time frame.

17 Q. And did the activity continue to increase
18 after that 2016 to 2017 time frame?

19 MS. CAHOY: Objection to form.

20 THE WITNESS: Did the activity continue --
21 could you repeat your question.

22 BY MR. VAN HOVEN:

23 Q. Yeah. And -- and I -- I may be a little
24 unclear. Let's just think of it in terms of volume
25 of refurbished -- or volume of instruments that

1 undergo a Rebotix type process. Is that an okay way
2 to look at it?

3 A. Yeah. I think there might have been a
4 leveling off after the first European customers
5 looked into it. And I don't recall who else was
6 looking into it there besides customers. Whether
7 regulatory bodies got involved, I really don't
8 recall. I wasn't close to that. I think it
9 actually decreased. And then, when we saw it emerge
10 in the U.S., it seemed to increase again.

11 Q. When did it emerge in the U.S.?

12 A. I think this Panama Surgery Center
13 [verbatim] was one of the earliest instances of use.
14 Again, I don't recall exactly when we detected it.
15 But 2019 was when it seemed like there were several
16 hospitals that we were interacting with about this
17 issue.

18 Q. And about how long, once that started in
19 2019, did you -- did Intuitive continue to interact
20 with hospitals about this issue?

21 A. I think even by 2020, the activity
22 seems -- seemed to have lessened, and then COVID
23 hit, and I don't recall it being much of an issue
24 after COVID hit. I -- I don't know. I think it's
25 now been two years approximately since we've seen

1 I -- I know, in fact, as well that external legal
2 experts were consulted around this time.

3 Q. So I'm going to bring up as tab 67. Take
4 a look at this, and let me know when you're ready to
5 discuss what's been labeled as Exhibit 293 as
6 Intuitive-00049154.

7 (Jones Deposition Exhibit 293 was marked
8 electronically.)

9 A. (Witness reviews document).

10 Okay. I haven't reread every line, but it
11 looks like it has the three main sections of the
12 template we just looked at, as well as the letter to
13 Evergreen Hospital we looked at earlier.

14 Q. Yeah, and just -- and just for the record,
15 real quick, I don't think I mentioned it, but the
16 previous Exhibit 292 was Bates Number 0212226
17 [verbatim].

18 Going back to Exhibit 293, are -- are you
19 familiar with Marin General Hospital?

20 A. I'm seeing that it's in Greenbrae,
21 California. That's about as familiar as I am with
22 Marin.

23 Q. And do you have any -- from reviewing this
24 letter, does it appear that it relates to Marin's
25 use of instruments that were -- let me strike that.

1 From reviewing this letter, do you
2 understand that it's referring -- that it's based on
3 Marin's utilizing EndoWrist instruments service
4 by -- by a company such as Rebotix?

5 MS. CAHOY: Objection to form.

6 THE WITNESS: It -- it says that we
7 understand that Marin General is using or consider
8 using, so not actual use necessarily.

9 BY MR. VAN HOVEN:

10 Q. Got it.

11 But of what's referred to in the first
12 sentence as refurbished instru- -- EndoWrist
13 instruments?

14 MS. CAHOY: Objection to form.

15 THE WITNESS: Again, it says, "We
16 understand that Marin General Hospital is using or
17 considering using 'refurbished'" -- in parens,
18 excuse me, quote -- "'refurbished' EndoWrist
19 instruments, obtained from and/or modified by a
20 third party for use beyond the programmed number of
21 uses." [As read]

22 BY MR. VAN HOVEN:

23 Q. And -- and among other things, does this
24 letter contend that that's a breach or a potential
25 breach of Marin's agreements with Intuitive?

1 MS. CAHOY: Objection to form.

2 THE WITNESS: You want to go to the bottom
3 of page 2? Are you asking a specific question
4 because it's got a whole section about the contract
5 with Intuitive?

6 BY MR. VAN HOVEN:

7 Q. Yeah, sure. We can go there.

8 It -- and the -- and the question is
9 whether this letter is contending that use of those
10 types of instruments serviced by third parties is a
11 breach of Marin's contracts with Intuitive?

12 MS. CAHOY: Objection to form.

13 THE WITNESS: It says, "Using instruments
14 beyond the programmed number of uses is a material
15 breach of the Agreements."

16 Again, the opening line doesn't say
17 whether they have used or are considering.

18 BY MR. VAN HOVEN:

19 Q. Is there any other basis within this
20 letter for potentially contending that Marin
21 breached its contracts with Intuitive?

22 MS. CAHOY: Objection to form.

23 THE WITNESS: Could you repeat the
24 question.

25 BY MR. VAN HOVEN:

1 electronically.)

2 A. I've clicked on it.

3 Q. Okay. And take a look, let me know when
4 you're ready to discuss this document.

5 A. (Witness reviews document).

6 Okay.

7 Q. What does this document appear to be?

8 A. It is a similar letter to the previous one
9 we looked at.

10 Q. And -- and this one's to Banner Health?

11 A. Banner Health in Phoenix, Arizona.

12 Q. Are you familiar with Banner Health?

13 A. I think it's a pretty well known hospital
14 system in the Phoenix area. I don't know if it's
15 part of a larger organization. I don't know much
16 about the account.

17 Q. Would -- would it surprise you to hear
18 that Banner Health has over 40 Intuitive robots?

19 A. No.

20 Q. About how much does an Intuitive system
21 cost on its initial purchase?

22 A. It can vary anything -- I -- I haven't
23 looked at the approved price list recently. But I
24 think we have systems that start around 700,000.
25 And systems that -- with various options can be

1 Q. You'll see that the first paragraph
2 mentions two agreements, one that's in parentheses a
3 sales agreement, and one that's in parentheses a
4 ULSA.

5 Do you see that?

6 A. Mm-hmm.

7 Q. What is this sales agreement?

8 A. I'm not sure I've ever seen one, an
9 actual.

10 Q. Okay.

11 A. I imagine it is the terms of the system
12 purchase or lease. This says -- yeah, this says
13 "sale." I think the term may cover leases. I don't
14 know.

15 Q. And -- and that -- that's for the system,
16 meaning the robot, the console, and the vision cart?

17 MS. CAHOY: Objection to form. Outside
18 the scope.

19 THE WITNESS: I -- I would think it would
20 cover. And sometimes those also include some
21 initial inventory of instruments as well. So
22 there's -- there's just an initial investment. It
23 may not just be the system. And also -- and also a
24 first year of service is usually provided with a
25 system acquisition whether that's through a --

1 arranged in the lease terms or in the sales terms.

2 BY MR. VAN HOVEN:

3 Q. And in -- in the case of instruments that
4 might come with the sales agreements, once those
5 were used, the customer would have to purchase
6 additional instruments?

7 MS. CAHOY: Objection to form. Outside
8 the scope.

9 THE WITNESS: Generally, I think that's
10 how things would work, yes.

11 BY MR. VAN HOVEN:

12 Q. And do you have an understanding of what
13 the ULSA is?

14 A. It says here it's the use license and
15 service agreement.

16 Q. Do you have any idea how that fits in with
17 the sales agreement?

18 MS. CAHOY: Objection to form. Outside
19 the scope.

20 THE WITNESS: I don't know if they're
21 simultaneous, if it's separate in some cases, if
22 they're together in others. I don't know.

23 BY MR. VAN HOVEN:

24 Q. If we go to the second bullet point
25 there -- and actually, before we go there, we'll

1 note that the -- am I correct that the sales
2 agreement and that ULSA are collectively referred to
3 as "the Agreement" in this letter?

4 A. Yeah, it looks like there should be an
5 open quote, and there's one missing. But it says,
6 "Each as amended (collectively, 'the Agreement')."
7 And there's a footnote on it as well.

8 Oh, okay. That's standard legal. Yes,
9 the footnote goes further to, I think, imply that
10 those two are collectively called "the Agreement."

11 Q. And the -- I -- I see that there's a
12 double collectively, but almost -- the -- so that --
13 and capital A "Agreement" is referring to the
14 agreement -- to those two agreements together; is
15 that right?

16 A. Yes.

17 Q. If we go to the second bullet point, could
18 you take a look at that and let me know when you're
19 ready to discuss it.

20 A. Okay.

21 Q. It concludes with a statement that
22 "Intuitive may terminate the Agreement immediately
23 upon written notice, and any warranties applicable
24 to the System will become void."

25 Do you see that?

1 A. Yes.

2 Q. I'd -- I'd like to split that up into kind
3 of two portions.

4 What do you understand "Intuitive may
5 terminate the Agreement immediately upon written
6 notice" to mean?

7 MS. CAHOY: Objection to form. And I
8 would instruct the witness not to answer to the
9 extent it would reveal privileged information.

10 THE WITNESS: I'm not a lawyer. I
11 think -- and so I don't know if there's a -- a
12 period before the other party to -- to, you know,
13 dispute, but it -- it's -- I think it says the
14 arrangement that's established by the agreements
15 would cease.

16 BY MR. VAN HOVEN:

17 Q. That --

18 A. Are we -- are we asking what terminate
19 means, or -- I don't --

20 Q. Sure.

21 Yeah, I -- what's it mean to terminate the
22 agreement?

23 A. I think that it's no longer binding for
24 the two parties to fulfill their obligations.

25 Q. And so, Intuitive would no longer have to

1 fulfill any of its obligation with respect to
2 Banner's 40 plus robots?

3 MS. CAHOY: Objection to form. Outside
4 the scope.

5 THE WITNESS: Again, I don't know if the
6 agreements cover all 40 or the specific system. I
7 don't know that case.

8 BY MR. VAN HOVEN:

9 Q. But the termination of the agreement is
10 with respect to systems; right?

11 A. Systems --

12 MS. CAHOY: Objection to form. Outside
13 the scope.

14 THE WITNESS: I don't know if it is plural
15 systems in this case. I don't know if it was one
16 system or more systems that were being covered by
17 those agreements.

18 BY MR. VAN HOVEN:

19 Q. Right.

20 So -- but whether it's one or more
21 systems, the agreement is the agreement is for the
22 system; right?

23 A. I don't know. I was just saying I didn't
24 know whether it applied to plural systems.

25 Q. But you do know that the agreement